Supreme Court, U.S.
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No. 00-463

In The

Supreme Court of the United States

EDGAR A. GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

SANDRA GUERRA*
UNIVERSITY OF HOUSTON LAW CENTER
Houston, Texas 77203-6371
(713) 743-2134
Counsel for Edgar A. Garcia

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

I. THE ELEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE FIFTH AND SIXTH AMENDMENT RIGHTS SET FORTH IN *APPRENDI V. NEW JERSEY*, 120 S.Ct. 2348 (2000), WHICH DICTATES THE CONCLUSION THAT UNCHARGED OFFENSES THAT INCREASE THE MAXIMUM SENTENCE APPLICABLE UNDER THE FEDERAL SENTENCING GUIDELINES ARE SEPARATE OFFENSES THAT MUST BE CHARGED IN THE INDICTMENT AND TRIED BEFORE A JURY..... 1

II. THIS COURT SHOULD RESOLVE THE CONFLICT ON WHETHER THE LAW OF THE REQUESTING COUNTRY OR OF THE SURRENDERING COUNTRY GOVERNS IN DETERMINING WHETHER PUNISHMENT FOR AN OFFENSE INDEPENDENT OF THE EXTRADITION AGREEMENT HAS OCCURRED..... 5

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 120 S.Ct. 2348 (2000)...1, 3, 4, 5

Bluementhal v. United States, 322 U.S. 539 (1947) 4

United States v. Aguayo-Delgado, 220 F.3d 926 (8th Cir. 2000) 2

United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962)..... 8

United States v. Rogers, 228 F.3d 1318 (11th Cir. 2000).....1, 2

CONSTITUTIONS

U.S. Const.
Fifth Amendment..... 3

Sixth Amendment 3

STATUTES

21 U.S.C. § 841(b)(1)(A)..... 2

21 U.S.C. § 841(b)(1)(B).....1, 2

21 U.S.C. § 841(b)(1)(C)..... 2

OTHER AUTHORITIES

U.S.S.G. § 5K2.1 4

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE FIFTH AND SIXTH AMENDMENT RIGHTS SET FORTH IN *APPRENDI V. NEW JERSEY*, 120 S.CT. 2348 (2000), WHICH DICTATES THE CONCLUSION THAT UNCHARGED OFFENSES THAT INCREASE THE MAXIMUM SENTENCE APPLICABLE UNDER THE FEDERAL SENTENCING GUIDELINES ARE SEPARATE OFFENSES THAT MUST BE CHARGED IN THE INDICTMENT AND TRIED BEFORE A JURY.

The Government's Brief miscomprehends Petitioner's claim with regard to drug quantities. Petitioner's brief does not explicitly raise the issue that the indictment charging him with a Florida drug offense should also have specified the amounts of marijuana involved in that offense. Ironically, the Government correctly suggests that this omission was erroneous. Petitioner agrees that this is one of the issues that should be addressed by the courts below on remand; however, remand should occur after this Court has addressed the other constitutional issues that are ripe for decision at this time.[1]

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[1] As the Government suggests, Petitioner's sentence should be vacated by this Court and remanded for resentencing by the district court consistent with *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). The Eleventh Circuit's recent decision in *United States v. Rogers*, 228 F.3d 1318 (11th Cir. 2000), makes clear that Petitioner's sentence is unlawful under *Apprendi*. Like the defendant in *Rogers*, Petitioner was convicted of conspiring to commit a violation of 21 U.S.C. § 841(b)(1)(B), although the quantities of drugs with which Petitioner was charged with conspiring to possess were not stated in the indictment. The Eleventh Circuit has made clear that sentences such as

The thrust of Petitioner's argument is that the federal indictment in his case charged him only with drug offenses in the State of Florida and a related firearm charge, but he was sentenced not only for that offense, but also for an uncharged drug offense in the State of Louisiana and, more importantly, for an uncharged homicide. The Government correctly notes that this Court has

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Petitioner's are erroneous. *Rogers*, 228 F.3d at 1327 ("We hold today that drug quantity in section 841(b)(1)(A) and section 841(b)(1)(B) cases must be charged in the indictment and proven to a jury beyond a reasonable doubt in light of *Apprendi*.") The court determined that with regard to cases on direct review, such as Petitioner's, "there is no doubt that [defendants] are entitled to the benefit of the rule announced in *Apprendi* and applied here." *Id.* at 1328.

The court also ruled that the remedy in this case is to sentence Petitioner without reference to drug quantity. *Id.* Therefore, consistent with the court's decision in *Rogers*, Petitioner should be resentenced in the district court. The Eleventh Circuit's decision in *Rogers* would make Petitioner punishable under section 841(b)(1)(C), which provides punishment for conviction of an undetermined amount of drugs and provides for punishment "of not more than 20 years". *Id.* Petitioner would argue that the correct remedy was applied by the Eighth Circuit's decision in *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000). That court held that "[a] conviction of marijuana based on an indictment that fails to attribute an amount of marijuana to the defendant or to indicate that the distribution was for remuneration . . . is subject to the maximum penalty of one year imprisonment found in 21 U.S.C. 841(b)(4)." *Id.* at 933.

Since Petitioner was previously sentenced under § 841(b)(1)(B) which provides for a 40 year statutory maximum, it is beyond peradventure that Petitioner's erroneous sentence meets the showing of substantial prejudice required to establish plain error on review.

upheld the constitutionality of the Federal Sentencing Guidelines as a system for sentencing. Moreover, Petitioner agrees with the Government that a sentencing court may, consistent with constitutional principles, exercise its discretion by taking into account aggravating and mitigating circumstances related to the offense of conviction. Petitioner thus agrees that, in general, the departure authority granted to district courts in the Guidelines comports with the Constitution.

Contrary to the Government's suggestion (Gov. 9-11), Petitioner does not levy a blanket attack against the constitutionality of the Guidelines or of the sentencing court's departure authority. Petitioner makes the more limited argument that the Fifth and Sixth Amendment, as interpreted by this Court in *Apprendi*, should be found to place some limit on the types of factors sentencing courts may take into account in exercising their departure authority.

The court below departed upward from the Guideline range prescribed for the charged offenses by *five levels* to take into account an uncharged, unadjudicated homicide. This departure represents an increase in Petitioner's sentence of over nine years. Moreover, the court also factored into the sentencing calculus drug quantities related to uncharged allegations in Louisiana. This uncharged offense raised Petitioner's sentence by another 2 1/2 years. In total, the uncharged offenses increased Petitioner's sentence by more than 11 years, from the 15-17 year range to 30 years.

As more fully developed in Petitioner's Brief, this Court should grant certiorari to consider whether district

courts may properly depart upward to punish for uncharged, unadjudicated murders as is encouraged in U.S.S.G. § 5K2.1 as well as an uncharged drug offense. The decision *Apprendi* distinguished between "sentencing factors" and "sentence enhancements," finding the latter to be "elements" of a greater offense that must be charged in the indictment and proven to a jury:

> This [holding] is not to suggest that the term "sentencing factor" is devoid of meaning. The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.

Apprendi, 120 S.Ct. at 2365 n. 19. The use of uncharged offenses goes beyond a separate "element" of a greater offense and permits punishment based on a whole cluster of elements that comprise the separate offense.

Moreover, should the Court grant the Petition, Petitioner would seek leave fully to brief the question of whether the district court incorrectly adjudged the uncharged Louisiana offenses as relevant conduct. Petitioner would argue that the court's finding violates this Court's decision in *Bluementhal v. United States*, 322 U.S. 539 (1947). As such, the consideration of this separate,

uncharged alleged offense also violates the dictates of *Apprendi v. New Jersey*.

II. THIS COURT SHOULD RESOLVE THE CONFLICT ON WHETHER THE LAW OF THE REQUESTING COUNTRY OR OF THE SURRENDERING COUNTRY GOVERNS IN DETERMINING WHETHER PUNISHMENT FOR AN OFFENSE INDEPENDENT OF THE EXTRADITION AGREEMENT HAS OCCURRED.

The Government confuses two separate issues in assessing Petitioner's arguments based on the specialty doctrine of international law. The first issue is whether punishing Petitioner for uncharged offenses not included in the extradition agreement violates the specialty doctrine and whether the law of the United States or Canada should be considered in making this determination. The second, separate issue is whether Canada has consented, or waived objections, to the sentencing practices followed in this case.

First, this Court should determine whether the uncharged offenses for which the district court imposed an increase in Petitioner's sentence of more than 11 years are "separate" offenses from those listed in the extradition request. On this question there is a divergence of practice between the courts of the United States and those of Canada. (Of course, Petitioner's first argument based on *Apprendi* asks this Court to bring the practices of the American federal courts more in line with those of Canadian courts.) Assuming that American law continues to allow the consideration of uncharged offenses at sentencing and that Canadian law prohibits this practice, the

legal issue then is whether courts in the United States should follow American law or Canadian law in sentencing a person who has been extradited under the Extradition Treaty between the United States and Canada. As argued here and in Petitioner's Brief, the traditional test considers the law of the extraditing state, not the requesting state, and the Eleventh Circuit's decision to the contrary should be reversed by this Court and remanded for a new sentencing hearing that permits consideration of Canadian law.

The Government faults Petitioner for not citing any Canadian legal authority for the proposition that his sentence would be considered unconstitutional under Canadian law. (Gov. Brief 12 n. 4). No substantial authority has been entered into the record because the district court refused to permit the testimony of Dean William Schabas, the Dean of the Law School at the University of Quebec in Montreal. Dean Schabas is a renown legal expert on Canadian criminal law and international law. Dean Schabas travelled from Canada to Florida to testify regarding the legal issues involved in the application of the speciality doctrine to Petitioner's sentence. Ironically, the Government objected to the proffer of this testimony, stating: "Your Honor, I cited Your Honor in the government's response to the sentencing memorandum the *Abello-Silva* case which holds that the interpretation of doctine of specialty is to be controlled by U.S. law not by Canadian law. The witness' expertise may be superb, but it's irrelevant." (Transcript of Sentencing Hearing 124). Agreeing with the Government, the court refused to hear from Dean Schabas, relying instead on a skeletal affadivit by Dean Schabas that had previously been submitted to

the court by Petitioner. The court concluded that Dean Schabas's summary statements regarding the specialty doctrine were "not the true state of the treaty." (Transcript of Sentencing Hearing 136.)

The court apparently concluded that American law alone dictates what factors or offenses may be taken into account at sentencing. The court stated in response to Petitioner's specialty doctrine objection: "The response by the government to that I think is certainly well founded and states the appropriate law that I follow." (Transcript of Sentencing Hearing 136).

The Eleventh Circuit upheld this ruling, stating: "The question must be resolved in accordance with the law of the United States. While the law and position of the surrendering state may be considered, it is not controlling." (Petitioner's Brief, App. 3-4). In other words, the Eleventh Circuit held that Canadian law may or may not be considered (apparently at the whim of the district courts), and, if it is inconsistent with American law, it can simply be ignored by the district courts.

As argued fully in Petitioner's Brief, the Eleventh Circuit is in error. The treaty states that the extradited person may not be "detained, tried *or punished*" by the requesting state for an offense other than that for which extradition has been granted. Whether the district court may be permitted to punish Petitioner for an uncharged homicide in federal court should be determined by reference to Canadian law, not simply American law. As Petitioner has argued in his Brief, the test adopted by all the Circuit Courts, with the exception of the Eleventh Circuit's decision in this case, is "whether the *extraditing*

country would consider the offense actually tried 'separate.' " *United States v. Paroutian*, 299 F.2d 486, 490-91 (2d Cir. 1962) (emphasis added). Thus, the test looks to the law of the extraditing country to determine the intent of the extraditing country in granting the extradition. The uncharged offenses for which Petitioner was punished at sentencing are not simply "sentencing factors" but separate offenses, and would so be viewed by Canadian courts. Moreover, the fact that Petitioner was punished by both the State of Florida and the Federal Court for the same homicide would violate Canadian double jeopardy principles. Thus, Petitioner's sentence violates the specialty doctrine of the extradition treaty.

The Government suggests that the rule of specialty only applies to offenses for which a person is "tried", relying on the language in the traditional test in *Paroutian*. (Gov. Brief at 12 n. 5). On this point, the Government is simply wrong. The traditional specialty doctrine test refers to offenses for which a person is "tried" or "prosecuted" (as opposed to "punished") because specialty doctrine challenges have generally challenged additional charges added by means of superseding indictments. Petitioner's argument, challenging the practices authorized by the Federal Sentencing Guidelines, is one of first impression. Since there are no previous challenges to the procedure for punishing an individual, it should come as no surprise that there is no case law that speaks to the question of being "punished" for a charge not listed in the extradition agreement. Of course, the treaty makes no distinction and forbids a person from being "detained, tried, *or punished*" for an offense not included in the extradition agreement.

The second issue raised is whether the country of Canada has consented, or waived objections, to the sentencing practices in this case. As Petitioner's Brief argues, Canada has sent no written consent or waiver of objections through diplomatic channels, so as specifically to permit the punishment of Petitioner for offenses other than those listed in the extradition agreement. Apparently prompted by Petitioner's specialty doctrine objection made in the district court, the Government obtained a letter written by an American official in the U.S. Department of Justice stating that she had had a telephone conversation with a counterpart in the Canadian Department of Justice in which the Canadian counterpart stated "her opinion" that the sentencing practices would not violate the specialty doctrine. Based solely on this unofficial personal opinion of a law enforcement official relayed by telephone, the Eleventh Circuit concluded that the country of Canada "has acquiesced to the procedure by which such conduct is considered in sentencing." (Pet. App. at 4).

This Court need not reach the question of what requirements must be met to qualify as an official consent or waiver of objections by a foreign country. However, this Court should find that a verbal statement of personal opinion of a lower-level law enforcement official does not suffice to constitute an official statement by a sovereign country waiving objections regarding the interpretation of a treaty. Indeed, treaties are the supreme law of the land. For this reason, extradition treaty matters – like other important matters of foreign policy – are handled by the highest officials of the Department of State in

written documents transmitted through official diplomatic channels.

In short, the country of Canada has not forwarded any written statement consenting to the sentencing practices in this case, nor was there any indication in the extradition agreement that the federal court intended to take into account the State homicide charge or any drug offense allegations in Louisiana in punishing Petitioner. Thus, there is absolutely no basis for a finding that the country of Canada has agreed to waive objections to the sentencing practices followed in this case.

Respectfully submitted,

SANDRA GUERRA*
UNIVERSITY OF HOUSTON LAW CENTER
Houston, Texas 77203-6371
(713) 743-2134
Counsel for Edgar A. Garcia

* *Counsel of Record*